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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1091

MARVIN P. NODVIN,

Petitioner,

versus

RHODA B. NODVIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Georgia decided on September 26, 1979, rehearing denied on October 16, 1979. Appendices D. E.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Georgia, Case No. 35204, decided on September 26, 1979, rehearing denied October 16, 1979, is reported as 244 Ga. 447 and is set out in Appendix D hereto.

JURISDICTION

The judgment for the Supreme Court of the State of Georgia was entered on September 26, 1979, rehearing denied October 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Where the Supreme Court of the State of Georgia found the Georgia alimony statutes to be constitutional (*Bugden v. Bugden,* 225 Ga. 413(3), (1969), cert. den. 396 U.S. 1005, 24 L.Ed.2d 497, (1970)) and where the Supreme Court of the State of Georgia subsequent thereto again found the Georgia alimony statutes to be constitutional (*Murphy v. Murphy,* 232 Ga. 352 (1974), cert. den. 421 U.S. 929, 44 L.Ed.2d 87 (1975)), was Petitioner required, in spite of such decisions, to raise the unconstitutionality of the Georgia alimony statutes in a divorce action filed against him immediately subsequent to the decision of *Murphy v. Murphy, supra.*, in order to preserve his right to raise such unconstitutionality after the rendition of the decision of *Orr v. Orr,* 440 U.S. 268, 59 L.Ed.2d 306 (1979)? 47 LW 4224

2. Where an agreement, which was made the final order of the State Court was procured from Petitioner by Respondent under the Georgia alimony statutes which were then held to be constitutional by the Supreme Court of the State of Georgia, certiorari denied by the Supreme Court of the United States, which

agreement provided for continuing permanent alimony, could Petitioner, after the rendition of the decision of *Orr v. Orr, supra.*, move to set aside the continuing obligation of such agreement on the grounds that such agreement was obtained from him under threat of unconstitutional statutes then in effect?

3. Is an award of permanent alimony by the State to the wife out of the future earnings of the husband, based solely upon the purported needs of the wife and the projected ability of the husband to pay, without regard to the benefits, disabilities, costs, earnings and properties of the parties arising out of the marriage, such an act of the State as amounts to an order of involuntary servitude?

4. Where no minor children are involved, where the wife is an able bodied person and has independent means, and where there is no other compelling interest of the State, is the enforcement of an alimony decree by attachment for contempt an act of the State imposing imprisonment for debt?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Thirteenth and Fourteenth Amendments of the Constitution of the United States, Article I, Sec. I, Paragraph XIX, Article I, Sec. I, Paragraph XX and Article I, Sec. II, Paragraph III of the Constitution of the State of Georgia, as in effect at all times pertinent to this case, having been readopted in the Constitution of Georgia of 1976, being designated

respectively as Sections 2-119, 2-120 and 2-203, Code of Georgia Annotated, and set out herein:

> 2-119 (Art. I, Sec. I) Paragraph XIX. Slavery and involuntary servitude
>
> "There shall be within the State of Georgia neither slavery nor involuntary servitude, save as a punishment for crime after legal conviction thereof."
>
> 2-120 (Art. I, Sec. I) Paragraph XX. Imprisonment for debt
>
> "There shall be no imprisonment for debt."
>
> 2-203 (Art. I, Sec. II) Paragraph III. Protection the duty of government
>
> "Protection to person and property is the paramount duty of government, and shall be impartial and complete."

STATEMENT OF THE CASE

Petitioner and Respondent were formerly husband and wife. After some years of marriage, Petitioner and Respondent separated and remained so for more than ten years. During such entire period there was in effect in the State of Georgia a public policy designed to hinder the facility in the procurement of divorce and to provide for temporary and permanent alimony out of the property and future earnings of the husband for the permanent support and maintenance of the wife. Underlying this policy was the presumption of the delinquency of the husband and of his violation of his conjugal obligations.

In August 1974, while the State statutory scheme was in effect and held to be constitutional by the Supreme Court of the State of Georgia, Respondent obtained from Petitioner, by virtue of such public policy and under threats of scandalous trial and duress, an agreement purportedly settling the issues of alimony, property rights and the custody and support of the youngest of three children, who by then was nearly seventeen years of age. Respondent was represented by counsel. Petitioner was not.

The agreement provided that Petitioner would pay to Respondent a sum sufficient to yield to her in 1974 $15,000.00 net per annum after the payment of her federal and state income taxes; that there would be cost of living increases computed as of the first of January of each succeeding year; that the alimony payments would not abate by reason of the death of Petitioner, but remain as a charge against his entire estate; that the alimony payments would not be reduced as a result of the youngest child reaching majority; that Petitioner would provide medical and health insurance for Respondent; that Petitioner would keep in full force and effect for the benefit of Respondent various life insurance policies; that Petitioner would make a property division by a lump sum settlement, evidenced by a Note and Deed to Secure Debt; that Petitioner would pay attorney's fees to Respondent's attorneys in connection with the agreement and the divorce; that Petitioner would provide in his Last Will and Testament and any *inter vivos* testamentary trust, whether revocable or irrevocable, that 20% of his gross estate would

be devised and bequeathed to Respondent; that estate taxes would be paid from the other portions of Petitioner's estate and not from the portion devised to Respondent; and that Petitioner would not directly or indirectly transfer to third parties any property, whether presently owned or subsequently acquired, having an aggregate value of more than 1% of Petitioner's gross estate each year, except for adequate consideration of property and cash and except to the extent that property was transferred to Respondent or the children of the marriage.

On September 12, 1974, the Superior Court of DeKalb County without hearing, entered a final judgment and decree incorporating the agreement upon the uncontested divorce complaint of Respondent.

Thereafter Petitioner and Respondent, in July 1978, entered into a modification agreement, which they each executed out of the presence of each other, but which was not made the order of Court. The agreement eliminated the restraint upon transfer of property by Petitioner, the annual cost of living increases and the provision for the payment by Petitioner for the state and federal income taxes upon the alimony provided. In accordance with the new modification agreement, Petitioner made payments which Respondent accepted. In 1979, simultaneously with the discovery by Respondent that Petitioner, who had previously remarried, was soon to have another child, Respondent unilaterally abrogated the modification agreement and brought a contempt proceeding seeking compliance with the original final decree.

In his answer, Petitioner set out as his defenses that §30-204, Code Ann., providing for the enforcement of alimony by attachment for contempt where no children or child support is involved is unconstitutional in that it violates the prohibition of imprisonment for debt; that the original decree as it relates to the award of alimony was void and that it was granted under laws which were unconstitutional and that the subsequent modification agreement which Petitioner and Respondent had entered into was binding upon the parties even though it had not been made the order of Court.

Because of the decisions of the Supreme Court of Georgia relating to attachments for contempt for purported violations of alimony decrees, contempt proceedings are deemed to be motions and substantially no defenses are allowed.

At the conclusion of the evidence and after argument, the trial Court found Petitioner in willful contempt of Court. No written rulings were made as to any of the defenses of the Petitioner, including the constitutional attacks.

Petitioner appealed to the Supreme Court of the State of Georgia. Under the new rules which it had adopted subsequent to the decision of *Orr v. Orr, supra.*, no opinion was required and the judgment of the lower Court was affirmed without comment.

Petitioner filed his motion for rehearing which was denied, Hall, J., dissenting.

Respondent's application for contempt, Petitioner's answer and defenses, the order of the Superior Court of DeKalb County, the judgment of the Supreme Court of Georgia and the denial of the motion for rehearing by the Supreme Court of Georgia are set out respectively as Appendices A, B, C, D and E.

REASONS WHY THE WRIT SHOULD BE GRANTED

1.

Notwithstanding the decision of this Court in *Orr v. Orr, supra.*, the judicial and statutory scheme of the State of Georgia relative to divorce and alimony remains the same.

Within three days after the decision of *Orr v. Orr, supra.*, the Supreme Court of Georgia held:

> "Appellant challenges the constitutionality of the alimony statutes contained in Code Ann. §§30-201 - 30-212 because they deny equal protection of the laws by not providing for alimony for husbands. . . These statutes impose alimony obligations on husbands but not wives and violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, *Orr v. Orr*, ____ U.S. ____ (99 SC 1102, 59 L.E.2d ____) (1979). Accordingly, we hold Code Ann. §§30-201, 30-202, 30-202.1, and 30-203 unconstitutional.

> Nevertheless, we affirm the trial court's award of temporary alimony and attorney fees.
>
> The superior courts have authority to award temporary alimony including attorney fees to either party as a derivative and incidental power to the power to grant divorces." *(Stitt v. Stitt*, 243 Ga. 301 (1979)).

The case of *McGee v. McGee*, 10 Ga. 477 (1851), upon which the Supreme Court relied to continue the imposition of alimony obligations upon males solely contains this language:

> "We hold it settled by Statute, that the power to grant divorces in Georgia, belongs alone to the Superior Courts, sitting as Courts of law, and that alimony can only be allowed by the same Courts, through the verdict or decree of a Special Jury, after they have determined upon a divorce. But what kind of alimony? Why, very plainly, permanent alimony. That is, provision out of the property of the husband for the permanent support and maintenance of the wife. Our Statute gives to the Superior Courts the power which, in England belongs to the Ecclesiastical Courts, of annulling the marriage contract, or of separating the parties, and expressly grants what, in that Court, is an incidental power — the power to make permanent provision for the support and maintenance of the wife. . .

I see no reason why the Superior Courts of this State have not acquired jurisdiction over temporary alimony incidentally, as the Ecclesiastical Courts acquired jurisdiction over alimony, both temporary and permanent. It is founded in the most manifest justice and the sternest necessity. The property of the family is, generally, legally in the possession and under the control of the husband. Always so, except in cases where the wife has a separate estate. She may have brought a part or the whole of it into the family. After a decree of divorce, which establishes his delinquency, a provision for the wife is the equitable consequence of his violation of his conjugal obligations. He being in the wrong, it would be a strange perversion of right to turn her adrift upon the charities of the world, he retaining her patrimonial inheritance; and if she had none, then it would be still flagrantly unjust, as well as morally impolitic, to deny to her that support which, whilst under coverture, rel. ion and the laws accord to a wife at the hands of her husband. . .

'It is the established law of the Ecclesiastical Courts, in all suits for divorce, or suits for the restitution of conjugal rights, as soon as the Court is judicially informed that the fact of the marriage has taken place, that it is competent for the wife to apply for alimony pending the suit' . . . The wife, when suit is instituted for a

> divorce, whether she is plaintiff or defendant, is under the protection of the Court — the Court, as to her, is in loco parentis, and will compel the husband to maintain her during the litigation, and pay the means of conducting it, because she is a wife, and because the suit presumes separation, alienation and dependence. Upon these views of the subject, founded in principle and deduced from the authorities, the granting of the order for temporary alimony is not a trial, and is not violative of any constitutional right of the husband."

The rationale of the *McGee* decision, *supra.*, is fully explained in the case of *Head v. Head*, 2 Ga. 191 (1847). Aside from the religious pronouncements abounding therein, with its comparison of Moses and Christ, of Pagans and Jews, of Greece and Rome, of the intention of God in the creation and of the general doctrines and requirements of the religion of the Savior, the opinion stated:

> "What was the law of divorce prescribed by the supreme authority, and of force in Georgia, at the adoption of the Constitution in 1798? We answer the Ecclesiastical or Canon Law of England; or rather that branch of the common law known and distinguished as the ecclesiastical law. . .

The common law declares for what causes the marriage contract may be totally annulled, and these causes are derived from the idea of the Romish Church, that a marriage is a sacrament; yet the canon law was received and engrafted upon the common law recognized by Parliament, and acquiesced in and approved by the Protestant Church. It was commended to the framers of our Constitution in this, that it was the law of the Fatherland — the most enlightened State of Christendom — because it was sanctified by ancestral associations, and was proved to be adapted to the genius and habits of the freest people, next to our own people, on earth."

It was from the *Head* case that the public policy of the State of Georgia relating to divorce and alimony was enunciated.

> "On account of the peculiar interest of the public in the preservation of domestic relations, provisions have been made by the constitution of this State, and by legislative enactment, which take divorce suits out of the rules that govern other actions, and place restrictions around them indicating a policy to hinder facility in the procurement of divorces. This has been true ever since the adoption of the constitution of 1798. In *Head v. Head*, 2 Ga. 191, 194, it was said: 'It must be apparent to the most careless reader that the

> constitution of 1798 is in restraint of divorces; the wise framers of that instrument were careful to hinder facility in their procurement.'
>
> These and other laws peculiar to divorce suits clearly indicate an intention upon the part of the lawmaking power to impede the facility for obtaining divorces; and such purpose can only be attributed to a zealous regard for the well-being of society. Divorce suits affect not only the formal parties to the suit, but the entire social fabric as well." (*Haygood v. Haygood*, 190 Ga. 445, 448 (1940)).

The Supreme Court of Georgia having in the *Stitt* case, *supra.*, reaffirmed the power of the Courts of Georgia to grant alimony without statutory authority, now proceeded to entomb every divorce decree which had granted alimony under the unconstitutional divorce and alimony laws of the State of Georgia holding:

> "At oral argument, and by supplemental brief thereafter, Mr. Kosikowski has attempted to challenge the constitutionality of our alimony laws. *Orr v. Orr*, ____ U.S. ____ (99 SC 1102, 1111) (1979); *Stitt v. Stitt*, 243 Ga. 301 (1979). Mr. Kosikowski did not challenge the constitutionality of the Georgia laws on alimony in the trial court, and his attempt to raise that issue on appeal is not timely. . . The

fact that the alimony laws were declared unconstitutional pending his appeal, *Orr v. Orr, supra., Stitt v. Stitt, supra.*, does not require a different result. . . The claimed unconstitutionality of the alimony laws not being timely or properly raised, they are not invalid insofar as this case is concerned." (*Kosikowski v. Kosikowski*, 243 Ga. 414 (1979)).

"In line with *Kosikowski*, we now hold that questions concerning the constitutionality of our alimony laws can not be raised in contempt proceedings if such issues were not timely and properly raised at trial." (*Kirkpatrick v. Woodruff*, 243 Ga. 737 (1979)).

The rulings of the Supreme Court of Georgia have been consistent with the *Stitt* and *Kosikowski* cases, *supra.*, except where the Appellant was a wife rather than a husband. In *Osteen v. Osteen*, 244 Ga. 445, decided September 26, 1979, rehearing denied October 16, 1979, the Supreme Court held:

> "In *City of Valdosta v. Singleton*, 197 Ga. 194, 208 (28 S.E.2d 759) (1944), this court held: 'The authorities are in conflict on this question, but apparently the weight of authority is to the effect that a reviewing court should apply the law as it exists at the time of its judgment rather than the law prevailing at the rendition of the judgment under review, and may therefore reverse a judgment that was

> correct at the time it was rendered and affirm a judgment that was erroneous at the time, where the law has been changed in the meantime and where such application of the new law will impair no vested right under the prior law.' See *Fulton County v. Spratlin*, 210 Ga. 447(2) (80 S.E.2d 780) (1954); *State Hwy. Dept. v. Calhoun*, 114 Ga. App. 501 (151 S.E.2d 806) (1966); s.c. 223 Ga. 65 (153 S.E.2d 418) (1967).

There was no vested right in the appellee in the interlocutory order of the court, and no constitutional rights of the appellee here are involved. Therefore, this court will apply the law as it exists at the time of its judgment. That part of the trial court's order adjudging

> 'that the Plaintiff-wife is not entitled to permanent alimony for herself in this action for divorce as a matter of law,' is reversed and remanded for further proceedings in accordance with the provisions of Ga. L. 1979, p. 466."

To avoid the unnecessary repetition of the public policy of the State of Georgia as enunciated by the Supreme Court of the State of Georgia, there was introduced in the Legislature and promptly enacted on April 12, 1979 (Georgia Laws 1979, Pages 619 et seq.) a new appellate procedure act which removed the right of appeal from ". . . judgments or orders granting or refusing a divorce or temporary or permanent alimony, awarding or refusing to change child custody, or hold-

ing or declining to hold persons in contempt of such alimony or child custody judgment or order."

Henceforth it was decreed that parties to an action on account involving $25.00 have the right of appeal, but that persons found in contempt of a final order and decree for alimony, or otherwise adversely affected in domestic and custody matters, would be required to file an application to the appellate Courts to allow an appeal. See §§6-701, 6-701.1, Code Ann.

Subsequent thereto the Rules of the Supreme Court of the State of Georgia were amended. Should the Court agree to grant an application for appeal in a domestic matter, including contempt, the right of oral argument is denied in such cases, except upon motion and at the direction of the Court. (Rule 49.(3) effective August 1, 1979). In the light of the limitations placed upon appeals in domestic relations cases, Rule 59 of the Supreme Court of Georgia adopted simultaneously with Rule 49 which provides for affirmance without opinion need not be commented upon.

Aside from the legislation referred to in the preceding paragraphs which were in response to the *Orr* decision, *supra.*, the legislative history of divorce and alimony statutes both prior to and after the *Orr* decision, *supra.*, is further illustrative of the State's scheme for divorce and alimony.

Within forty days from the rendition of the *Orr* decision, *supra.*, the Legislature had enacted and the Governor had signed the family and domestic relations law amendments purportedly to conform with the decision of this Court rendered March 5, 1979.

The intent of this Act (Georgia Laws 1979, Pages 466, et seq.) is partially stated in Section 1 as follows:

> "It is the intent of the General Assembly and of this Act that no contract made or judgment, order, or decree rendered prior to the effective date of this Act should be overturned, modified, or disturbed by reason of the provisions of this Act and that no such contract, judgment, order, or decree should be overturned, modified, or disturbed except to the extent absolutely required by the Constitution of this State or of the United States. Nothing in this Act, however, shall be construed to prohibit modification of judgments, decrees, or orders to the extent such modification is expressly authorized by statute. Nothing in this Act shall be construed to authorize any court to entertain any claim of constitutional right, which claim is barred because it was not timely raised in any previous judicial proceeding."

The newly enacted Code Sections merely eliminated gender from consideration in the awarding of alimony and granted to either spouse the right to assert a claim to the same. (*Davidson v. Davidson*, 243 Ga. 848, 850). The

major revision of the divorce and alimony laws of the State of Georgia consisted of the substitution of the word "party" for the word "husband".

The alimony laws retain their same flavor and effectiveness because these laws did not prior to their amendment contain nor do they now contain any standard or criterion upon which the award of alimony may be based, other than marriage, the needs of one party and the ability of the other party to pay.

Any act, except one for divorce and alimony, which is so vague and indefinite in the duties and obligations imposed upon either party and which grants to a jury or Judge, as the case may be, an unlimited right of award by which they may vent their anger or exercise their prejudice would be struck down as unconstitutional. With the public policy of the State of Georgia as it is, statutes which do not fix with reasonable certainty the basis and purpose for alimony circumvent the mandate of *Orr v. Orr, supra*. The constitutional deficiencies of the alimony statutes, which are part of the fabric of the State domestic relations policy, cannot be cured by simple substitution of nomenclature.

For example, suppose that a State had in effect a statute which provided: "Any naturalized Mexican-American who commits a felony may be banished to Mexico his country of origin." This Act as this Court will note, is unconstitutional on its face. Upon a decision of this Court to that effect, would an amendment simply eliminating the word "Mexican" cure the constitutional deficiencies?

Certainly not!

The Act was apparently designed for the purpose of banishing naturalized Mexican-Americans and not for the banishment of any other naturalized American. As amended it could only be applied to naturalized Mexican-Americans, since only they would have Mexico as their country of origin.

It must be noted that Petitioner, by describing the acts of the Supreme Court of the State of Georgia and of the Legislature of the State of Georgia in furtherance of what they deem to be the proper public policy for the State of Georgia does not ascribe to them any tainted motives. Persons of honor may differ. Yet it is precisely for the preservation of the right to advocate to others within the limitation of the right to impose upon others seemingly good intentions that the freedoms and constraints contained in the Constitution of the United States were designed.

Where the Supreme Court of the State of Georgia found the Georgia alimony statutes to be constitutional (*Bugden v. Bugden, supra.*) and where the Supreme Court of the State of Georgia subsequent thereto again found the Georgia alimony statutes to be constitutional *(Murphy v. Murphy, supra.)*, the Petitioner was not required to raise the unconstitutionality of the Georgia alimony statutes in a divorce action filed against him immediately subsequent to the decision of *Murphy v. Murphy*, since it would have amounted to a useless act, which the law does not require. To hold

otherwise is to deny the benefits to the citizens of the United States of any decisions of the Courts where such citizen has failed, for whatever reason there may be, to seek the result obtained in such new decisions. To hold otherwise is to declare that the Emancipation Proclamation applied only to those slaves who had made known to their masters their objections to their status of servitude. To hold otherwise is to breathe life into void enactments, separating into two classes those citizens against whom it shall apply and those against whom it shall not.

> "When the statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of any act which is found to be unconstitutional, and which, consequently, is to be regarded as having never been, at any time, possessed of any legal force." (*Fuller v. Yetter*, 40 App. 58, 60).

Even if the theory that there is somehow an inhibition in applying a decision of unconstitutionality upon transactions in which there are so-called vested rights, continuing payments under a continuing order for alimony cannot be so construed as vested. Until the day that the payment is to be made it is not due. If the wife should die prior to the date of payment, the obligation

would cease. If the wife should remarry, alimony would terminate.

> "Since no vested rights are involved, we find no inhibition in applying the usual rule as to the overruling of a prior case: '[t]he general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law.' " (*Beecher v. Dept. of Transportation*, 155 Ga. App. 355).

So long as Petitioner is obligated to make payments of alimony under a decree rendered under unconstitutional statutes his constitutional rights are continually violated and he should not be denied the right to seek relief. The obligations contained in the decree rendered under unconstitutional acts are of a nature of that of a continuing trespass. Every continuance of such a trespass is a renewal of the wrong and is actionable until abated. (*Reid v. The City of Atlanta*, 73 Ga. 523 (1884); *Shaheen v. G&G Corporation*, 230 Ga. 646, 648 (1973)).

For each of the reasons assigned in this division and upon the authority of *Orr v. Orr, supra.*, the Writ should be granted and the judgment of the Supreme Court of the State of Georgia should be reversed.

2.

It is undisputed that the original divorce decree was obtained by default based upon a purported agree-

ment extracted from Petitioner by Respondent under the unconstitutional alimony laws then in effect.

Contrary to its holdings in alimony cases, the Supreme Court of the State of Georgia has sanctioned the right of a party to raise a constitutional issue for the first time on appeal if such issue has not been ruled upon at trial. (*Barnes v. The State*, 244 Ga. 302 (1979)). The Court relied upon its decisions in *Hammock v. Zant*, 243 Ga. 259 (1979) and *Brown v. Housing Authority*, 240 Ga. 647 (1978), wherein the Courts stated at Page 653:

> "We do not find that the requirements as to constitutional challenges should be invoked in suits involving public bodies to defeat such constitutional rights as the public may have in this premises. . . Judicial economy will result and the public interest will be served. . . Because the rights of the public are involved, we will proceed to the merits, including consideration of the Constitution, to the extent possible."

The argument and citation of authority presented in response to the first question of this Section of the Petition for Writ of Certiorari are adopted and incorporated in response to Question No. 2.

Where an agreement, which was made the final order of the State Court was procured from Petitioner by Respondent under the Georgia alimony statutes which were then held to be constitutional by the Supreme Court of the State of Georgia, certiorari denied by the Supreme Court of the United States, which agreement provided for continuing permanent alimony, the judgment having been obtained by default with no challenge to the constitutionality of the Georgia alimony statutes then made by Petitioner, it is proper upon such alimony statutes having been declared unconstitutional to move to set aside the continuing obligation under such agreement on the grounds that the agreement was obtained from him under threat of unconstitutional statutes then in effect.

For each of the reasons assigned in this division and upon the authority of *Orr v. Orr, supra.*, the Writ should be granted and the judgment of the Supreme Court of the State of Georgia should be reversed.

3.

"Peonage" is a status or condition of compulsory service or involuntary servitude based upon a real or alleged indebtedness. (*Pierce v. U.S.*, C.C.A.Ga. 1944, 146 F.2d 84, certiorari denied 65 S.Ct. 1011, 324 U.S. 873, 89 L.Ed. 1427, petition denied 157 F.2d 848, certiorari denied 67 S.Ct. 631, 329 U.S. 814, 91 L.Ed.694). Peonage has been abolished. (42 §1992, U.S.C.A.). Both the Thirteenth Amendment of the United States Constitution and Article I, Section I, Paragraph XIX, Constitution of the State of Georgia, §2-119, Code Ann., abolish and prohibit slavery and involuntary servitude, except as a punishment for crime.

The language of the case of *McGee v. McGee, supra.*, supplies the crime which must be the basis for the

award of alimony as the jury or Judge, without criterion and without standards, may decide to impose upon the husband.

> "After a decree for a divorce, which establishes his delinquency, a provision for the wife is the equitable consequence of his violation of his conjugal obligations. He being in the wrong. . ." *(Head v. Head, supra.).*

The alimony laws pertinent to this Petition for Writ of Certiorari as were in effect prior to the rendition of *Orr v. Orr, supra.*, and as are now in effect are annexed to this petition as Appendix F.

The obligations of parties for their children is not at issue in this petition. What is of concern is the basis upon which involuntary servitude is cast upon a party to a marriage solely in response to the need of one and the assets and earning capacity of the other.

The servitude cast upon the party required to pay alimony establishes obligations against such party to which such party would not be subjected to if such party remained married. The reality of the situation is that the word "husband" should be substituted for the word "party" in the foregoing sentence. Husband is the proper word. It has so been used, for in the eyes of the law of the State of Georgia, upon divorce, the husband is still the husband, except, that if he remained married and were unable to provide in the manner that the wife had previously been accustomed to, he would suffer no dis-

grace or punishment. But having committed the crime of divorce, the husband upon his failure to make payments as mandated under the alimony decree, even when he may be excused from willful contempt because of his incapacity or inability to pay, is not relieved of the obligation which the law has imposed upon him.

The statutes of the State of Georgia relating to alimony, amended or unamended, do not require the supported party to work or otherwise contribute to her support where the other person has the ability to pay. The marriage, that partnership between a man and a woman, is by itself basis enough for the State to require continued service for the benefit of the other spouse.

In no other relationship is one partner required to support the other. While the assets of the partnership may, upon dissolution, be distributed in some equitable manner based upon the efforts and investments of the partners, the partner himself is not an asset of the partnership and his future efforts are not subject to the grasp of the other partner.

An award of permanent alimony by the State to the wife out of the future earnings of the husband, an award of permanent alimony by the State to any party out of the future earnings of the spouse, based solely upon the purported needs of the party receiving the alimony and the projected ability of the other party to pay the alimony, without regard to the benefits, disabili-

ties, costs, earnings and properties of the parties arising out of the marriage is an act of the State that amounts to an order of involuntary servitude.

For each of the reasons assigned in this division and upon the authority of *Orr v. Orr, supra.*, the Writ should be granted and the judgment of the Supreme Court of the State of Georgia should be reversed.

4.

A judgment for alimony is a money judgment or debt, payment of which may not be enforced by contempt action and imprisonment. (*Harrington v. Harrington*, 121 S.W. 291(2) (1938); *State Ex Rel. Schutz v. Marion Superior Court, Room No. 7*, 307 N.E.2d 53).

"There shall be no imprisonment for debt." (Article I, Section I, Paragraph XX, Constitution of Georgia 1976).

"Our statutes expressly provide that 'all orders and decrees of the court may be enforced by attachment against the person; decrees for money may be enforced by execution against the property.' Code, §3099. 'A decree in favor of any party for a specific sum of money, or for regular installments of money, shall be enforced by execution against property as at law.' Code, §4215. 'Every decree or order of a court of equity may be enforced by attachment against the person for contempt, and if a decree be partly for money and partly for the performance of a duty, the former may

be enforced by execution and the latter by attachment or other process.' Code, §4216.

'The clear legislative intent is manifest, to enlarge and render more efficacious equitable remedies, while preserving the remedies the courts had previously employed in the absence of statutes providing others. Under our statutes, when a party is decreed to perform a duty or to do any act, other than the mere payment of money, which the court has jurisdiction to adjudge he shall do, if he disobeys, the authority of the court is defied; he is guilty of contempt, and the arrest and imprisonment of his person is not imprisonment for debt in any appropriate sense of the term. But if a court of equity should render a simple decree for money, on a simple money verdict, — a decree which it may now enforce by the ordinary common law process against property, the failure to pay the decree would not be a contempt, nor could compulsory process against the person of the party in default be resorted to to enforce payment.' *Clements v. Tillman*, 79 Ga. 451 (5 SE 194) (1887). 'There is to our minds a clear distinction between a decree for the mere payment of money, rendered without any regard whatsoever to defendant's ability to pay, and without having previously ascertained that he has the money, and an order made in a proper case directing him to deliver up money conclusively shown to be in his possession. Judgments are render-

ed every day by the courts in favor of plaintiffs against defendants for money due, irrespective of the fact whether the latter are paupers or millionaires. Refusal or failure to pay such judgments is in no sense a contempt of court, and imprisonment for such failure would be imprisonment for debt pure and simple.' *Ryan v. Kingsbery*, 88 Ga. 361, 372 (14 SE 596) (1891). See also *Wood v. Wood*, 84 Ga. 102(1) (10 SE 501) (1889)." (*London v. London*, 149 Ga. App. 805, 806 (1979)).

The order allowing alimony may be enforced either by writ of fieri facias or by attachment for contempt. §30-204, Code Ann.

Alimony decrees do not require the transfer of specific identifiable pieces of currency that were in existence at the time that the decree was entered. Rather they direct payment out of future earnings, or out of whatever source the payer can resort to. Were the order not in an alimony case, there would be no question that the requirement for payments in installments is but a debt and not enforceable by an action for contempt. But alimony is protected by the cloak of the Ecclesiastical Courts from whence the obligation still flows.

To insure that the punishment of the alimony payer is not abated, he may not raise in the contempt proceeding facts relating to duress or fraud in the procurement of the judgment (*Paisley v. Huddleston*, 244 Ga. 418(1) (1979)); he may not file a counterclaim or cross-complaint (*McNeal v. McNeal*, 233 Ga. 836 (1975)). The action by which he may be placed in jail is for some reason not tantamount to the filing of a complaint so as to allow the party accused of contempt the right to trial by jury or even to a judgment which has findings of fact and conclusions of law. (*Hines v. Hines*, 237 Ga. 755, 756 (1976); *Fields v. Fields*, 240 Ga. 173 (1977); *Branch v. Branch*, 219 Ga. 601(1) (1964)).

The decisions relative to venue complete the destruction of the right of the party accused of contempt in an alimony case to defend himself. No matter where the parties to the original divorce decree now reside, so long as they are in the State of Georgia, the application for contempt must be filed in the Court wherein the original decree was entered. (*Bilbo v. Bilbo*, 167 Ga. 602 (1928)). It is a motion and it bears the same case number. (*Davis v. Davis*, 230 Ga. 33 (1973)). Should he seek to modify the original decree, he must bring a separate action in the county wherein the party against whom he seeks modification resides. (*Bugden v. Bugden*, 224 Ga. 517 (1968)). Should he seek to set aside the judgment on the ground of fraud or duress, he must bring a separate complaint in equity in the county wherein the original decree was granted. (*Hill v. Harper*, 230 Ga. 246 (1973)). Should he seek to set aside the judgment on the ground of jurisdiction, he must bring a separate complaint in equity in the county wherein the Defendant resides. (*Bonneau v. Ohme*, 244 Ga. 184 (1979)).

It is therefore possible that the alimony payer accused of contempt, where neither he nor his former wife are residents of the county wherein the original divorce was obtained, could be found in contempt while he had pending in the very same Court by complaint in equity an action to set aside the judgment upon the basis of fraud or duress, an action for modification of the judgment in the county where the former wife resides, an action by complaint in equity based on jurisdiction in the county where the wife resides and, perhaps, a plea to the Creator that he be relieved of the misery which has been heaped upon him.

Unless there is some compelling reason, unless there is some compelling interest of the State that must be served, where there are no minor children involved, where the wife is an able bodied person and has independent means, the enforcement of an alimony decree by attachment for contempt is an act by the State imposing imprisonment for debt.

For each of the reasons assigned in this division and upon the authority of *Orr v. Orr, supra.*, the Writ should be granted and the judgment of the Supreme Court of the State of Georgia should be reversed.

CONCLUSION

Petitioner has not in the Section entitled "Reasons Why the Writ Should be Granted" of this Petition for Writ of Certiorari quoted the pertinent portions of *Orr*

v. Orr, supra. That opinion is before this Court and is the basis for this petition.

Petitioner, for himself, and for those others who have had hope reinstilled by the decision in *Orr v. Orr, supra.*, that the inequitable burdens of involuntary servitude imposed by the States may be yet removed or diminished, pray that this Court grant this Petition for Writ of Certiorari and afford to all citizens the protection which the *Orr* decision declares.

Respectfully submitted,

THEODORE S. WOROZBYT

MARVIN P. NODVIN
Attorneys for Petitioner

2410 Peachtree Center Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 659-7070

CERTIFICATE OF SERVICE

We, Theodore S. Worozbyt and Marvin P. Nodvin, hereby certify that we are members of the bar of the Supreme Court of the United States and that we have served copies of the Petition for Writ of Certiorari in the above styled case on Counsel for the Respondent by depositing same in the United States mail, first class postage prepaid, addressed as follows:

George S. Stern, Attorney
Macey & Zusmann
1795 Peachtree Road, N.E.
Atlanta, Georgia 30309

THIS ____ day of January, 1980.

THEODORE S. WOROZBYT

MARVIN P. NODVIN
Attorneys for Petitioner

2410 Peachtree Center Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 659-7070

APPENDIX "A"

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

RHODA B. NODVIN,
Plaintiff,

versus C.A. No. 79872

MARVIN P. NODVIN,
Defendant.

Filed: April 4, 1979

APPLICATION FOR
CONTEMPT OF COURT
AGAINST DEFENDANT

1.

That on or about September 12, 1974, the Honorable Clyde W. Henley, Judge of the Superior Court of DeKalb County, ordered the defendant above-named to pay to plaintiff a cost of living increase so that plaintiff would receive $15,000.00 each year as alimony net of actual taxes.

2.

That as of the date of the filing of this petition for contempt, the defendant is $4,762.00 in arrears in his payments as aforesaid; the defendant having willfully

ailed and refused to pay said monies when due in compliance with the court order dated September 12, 1974.

3.

That on or about September 12, 1974, the Honorable Clyde W. Henley, Judge of the Superior Court of Dekalb County, ordered the defendant to pay to plaintiff the amount of taxes which plaintiff would normally have to pay in each year in order for plaintiff to receive a net of $15,000.00 per year as alimony.

4.

That as of the date of the filing of this petition for contempt, the defendant is $1,415.00 in arrears in his payments as aforesaid; the defendant having willfully failed and refused to pay said monies when due in compliance with the court order dated September 12, 1974.

5.

Plaintiff asks that the defendant be adjudged in contempt of this court for his failure of and refusal to pay said monies as provided in said court order.

WHEREFORE, plaintiff prays that the defendant be adjudged in contempt of this court for failure to abide by this court's order, and accordingly, be placed in a common jail, and that further, attorney fees be awarded to plaintiff for the prosecution of this Application For Contempt Of Court Against Defendant and for such other and further relief as this court may deem meet and proper.

MACEY & ZUSMAN

/s/ GEORGE S. STERN
GEORGE S. STERN
Attorney for Plaintiff

1795 Peachtree Road, N.E.
Atlanta, Georgia 30309

(404) 897-7200

STATE OF GEORGIA
COUNTY OF FULTON

PERSONALLY APPEARED before the undersigned officer duly authorized to administer oaths, RHODA B. NODVIN, who, after first being duly sworn, deposes and says that the facts contained in the within and foregoing Application For Contempt Of Court Against Defendant are true and correct to the best of her knowledge and belief.

/s/ RHODA B. NODVIN
RHODA B. NODVIN

Sworn to and subscribed before me this 27th day of March, 1979.

/s/ ILLEGIBLE
NOTARY PUBLIC

Notary Public, Georgia, State at Large
My Commission Expires May 3, 1981

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

(Number and Title Omitted)

ORDER

The within and foregoing Application For Contempt Of Court Against Defendant having been read and considered, the Sheriff is hereby ordered to serve the defendant with a copy of same. The defendant is hereby ordered to show cause before this Court on the 1st day of May, 1979, at 10 o'clock a.m., as to why the plaintiff's application for contempt and prayers should not be granted.

This 5th day of April, 1979.

/s/ ROBERT K. BROOME
JUDGE, SUPERIOR COURT
OF DEKALB COUNTY

APPENDIX "B"

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

RHODA B. NODVIN,
Plaintiff,

versus CA No. 79872

MARVIN P. NODVIN,
Defendant.

Filed: April 24, 1979

ANSWER

FIRST DEFENSE

The Application for Contempt fails to set forth a claim upon which relief can be granted.

SECOND DEFENSE

§30-204, Code Ann., as amended by Acts 1979, to the extent that it provides for the enforcement of an order of alimony by attachment for contempt where no children and no child support is involved and there is no interest of the state other than the enforcement of payment of money from one spouse to the other, is unconstitutional in that it violates §2-120, Code Ann., (Art. I, Sec. I) Paragraph XX, Constitution of Georgia of 1976 which prohibits imprisonment for debt.

THIRD DEFENSE

1.

Paragraphs 1 and 3 of the Application for Contempt are neither admitted nor denied as the Order of September 12, 1974 referred to therein speaks for itself.

2.

Paragraphs 2, 4 and 5 of the Application for Contempt are denied.

3.

Plaintiff may not recover attorney's fees because:

(a) §30-219, Code Ann., Acts 1947, p. 292, providing for the award of attorney's fees in contempt actions has been repealed by Acts, 1979;

(b) §30-202.1, Code Ann. as amended Acts 1979, when construed in connection with §30-202, Code Ann., as amended Acts 1979, provides for the award of attorney's fees as part of the expenses of litigation made at any time during the pendency of the litigation and does not authorize the award of attorney's fees on a contempt action on a final judgment.

FOURTH DEFENSE

1.

On September 12, 1974, a Final Decree of Divorce, which contained an Agreement between Plaintiff and Defendant was entered in the within case.

2.

Subsequent thereto, because of substantial changes in condition, Plaintiff and Defendant entered into negotiations for a modification of such Agreement.

3.

Throughout such period, upon the express promise of Plaintiff to modify and compromise the Agreement, Defendant made substantial payments for the education and welfare of children who had reached their majority and refrained from seeking modification of the Agreement.

4.

Plaintiff and her accountant negotiated with the Defendant and agreed orally to a compromise upon a substantial payment by Defendant.

5.

Defendant sent such payment to Plaintiff together with the Agreement reduced to writing.

6.

Plaintiff received such payment, but in bad faith, withheld sending the Agreement for some three months and, upon repeated requests by the Defendant, finally sent to him a copy of the Agreement improperly executed.

7.

Upon insistance by Defendant that such Agreement be properly executed, Plaintiff advised Defendant that the fully executed original was in the possession of her accountant, Paul Aronin, and directed Defendant to contact such accountant.

8.

Defendant then obtained such compromise and modification, a copy of which is hereto attached, marked Exhibit "A" and made a part hereof.

9.

Defendant made all payments in accordance with such Agreement.

10.

Defendant then sent to Plaintiff, as per their Agreement, the application for modification and acknowledgement of service.

11.

Plaintiff, in bad faith, and in fraud of Defendant, continuously promised to return such documents but failed to do so.

12.

Defendant has faithfully abided by the terms of this modification, even while the within Application for Contempt is pending.

13.

Plaintiff has acted in bad faith, has been stubbornly litigious and has caused the Defendant unnecessary trouble and expense for which Defendant is entitled to recover the expenses of litigation, including reasonable attorney's fees.

14.

Defendant is entitled to have the Agreement of the parties set out as Exhibit "A" made the order of this Court.

FIFTH DEFENSE

The alimony decree entered on September 12, 1974, as it relates to the award of alimony after the minor children have attained their majority, is unconstitutional and void in that having been granted under the provisions of §§30-201, 30-202, 30-202.1, 30-206, 30-209, 30-219 and 30-223, it is violative of the constitutional provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States and Art. I, Sec. II, Paragraph III, Constitution of Georgia of 1976.

SIXTH DEFENSE

The alimony decree entered on September 12, 1974, as it relates to the award of alimony to the wife, based upon the purported needs of the wife, the ability of the husband to pay, without regard to the benefits, dis-

abilities, costs, earnings, and properties of the parties arising out of the marriage is unconstitutional and void in that, having been granted under §30-201, Code Ann., it is violative of the constitutional provisions of Art. I, Sec. I, Paragraph XIX, Constitution of Georgia, 1976, formerly Sec. 2-117, Code Ann., Constitution of Georgia, 1945, and the Thirteenth Amendment of the Constitution of the United States; the requirement of the payment of alimony from future earnings amounts to an order of involuntary servitude.

SEVENTH DEFENSE

The alimony decree entered on September 12, 1974 contained an agreement for the payment of permanent alimony and property division which was entered into by the Defendant upon the mistake of fact and law that the alimony statutes of the State of Georgia were constitutional.

2.

Such mistake of fact and law was predicated upon the decision of the Supreme Court of Georgia in the case of *Murphy v. Murphy*, 232 Ga. 352.

3.

By virtue of such mistake of fact and law, Defendant has parted with substantial sums and a Note and Deed to Secure Debt on property in DeKalb County, Georgia, recorded in Deed Book 3239, page 449.

4.

Defendant is entitled to recover all sums paid to the Plaintiff under such mistake of fact and law and to the cancellation of such Note and Deed to Secure Debt.

WHEREFORE Defendant prays:

(a) That the Application for Contempt be denied;

(b) That §30-204, Code Ann., as amended by Acts 1979 be declared unconstitutional;

(c) That Plaintiff recover no attorney's fees;

(d) The Agreement of the parties as set out in Exhibit "A" be made the Order of this Court;

(e) That the Defendant be awarded the expenses of litigation, including reasonable attorney's fees;

(f) That the Decree entered on September 12, 1974, as it relates to the award of alimony, be declared null and void as being violative of the Fifth, Thirteenth, and Fourteenth Amendments of the United States Constitution and Article I, Sec. II, Para. III and Article I, Sec. I, Para. XX, Constitution of Georgia, 1976.

(g) That Plaintiff be required to account for and pay over to Defendant all sums paid by Defendant under such void decree;

(h) That the Note and Deed to Secure Debt recorded in Deed Book 3239, Page 449, DeKalb County records be cancelled; and

(i) That Defendant have such further and other relief as is meet and proper.

WOROZBYT & NODVIN

/s/ THEODORE S. WOROZBYT
THEODORE S. WOROZBYT

EXHIBIT A

(Number and Title Omitted)

MODIFICATION

The parties, MARVIN P. NODVIN, hereinafter called "HUSBAND" and MRS. RHODA B. NODVIN, hereinafter called "WIFE", have agreed to modify that certain Agreement between HUSBAND and WIFE dated August 12, 1974, made part of the Final Order and Decree in the above styled action, as follows:

1.

Paragraph I. entitled "Alimony" and Paragraph VII. entitled "General Provisions" are hereby stricken in their entirety and the following paragraph is substituted in lieu thereof:

I. ALIMONY

HUSBAND and WIFE agree that all sums paid by HUSBAND prior to and including December 31, 1977 are in full satisfaction of any alimony due by HUSBAND and WIFE for that period.

HUSBAND shall, beginning January 1, 1978, pay to WIFE, as permanent alimony, so long as WIFE is living and shall not have remarried, the sum of $15,000.00 per year payable in semi-monthly installments.

2.

This modification shall control and supersede any provisions of the original agreement which are in conflict herewith.

HUSBAND and WIFE consent that this Modification of the Agreement be made the order of Court in the case of Rhoda B. Nodvin vs. Marvin P. Nodvin, DeKalb Superior Court, Case No. 79872.

IN WITNESS WHEREOF, parties have hereunto set their hands and seals, this 25th day of July, 1978.

/s/ MARVIN P. NODVIN
MARVIN P. NODVIN
(HUSBAND)

/s/ RHODA B. NODVIN
RHODA B. NODVIN
(WIFE

/s/ ILLEGIBLE
WITNESS

/s/ JUDITH L. HARVEL
NOTARY PUBLIC
Notary Public, Georgia, State at Large
My Commission Expires Sept. 17, 1980

/s/ ILLEGIBLE
WITNESS

/s/ ILLEGIBLE
NOTARY PUBLIC

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

(Number and Title Omitted)

VERIFICATION

Personally appeared before the undersigned officer Marvin P. Nodvin, who on oath deposes and says that

the facts stated in the foregoing response are true and correct.

/s/ MARVIN P. NODVIN
MARVIN P. NODVIN

Sworn to and subscribed
before me this 23rd day of
April, 1979.

/s/ JUDITH L. HARVEL
NOTARY PUBLIC
Notary Public, Georgia, State at Large
My Commission Expires Sept. 17, 1980

APPENDIX "C"

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

RHODA B. NODVIN,
Plaintiff,

versus CA No. 79872

MARVIN P. NODVIN,
Defendant.

Filed: May 7, 1979

ORDER

The above-styled case coming on regularly for hearing on plaintiff's Application For Contempt Against Defendant on May 4, 1979, with both parties present in Court and represented by counsel, and after hearing and considering the evidence presented, the Court finds the defendant, MARVIN P. NODVIN, in willful contempt of this Court and in arrears in the sum of $6,-157.00 for alimony arrearage.

It is the Order of this Court that the defendant shall purge himself of said contempt by compliance with the following:

(1) Paying to Rhoda B. Nodvin, plaintiff, the sum of $6,157.00, which sum represents alimony arrearage, within seven (7) days from the date of this Order.

(2) Paying to George S. Stern, attorney for plaintiff, the sum of $1,350.00 as attorney fees for representing the plaintiff in this contempt action, payable to George S. Stern within seven (7) days from the date of this Order.

It is the further Order of this Court that should the defendant fail to purge himself as herein provided, then the Sheriff of Dekalb County shall instantly arrest the defendant and incarcerate him in the Dekalb County jail until further Order of this Court.

It is further ordered that all filing costs and court costs in connection with this May 4, 1979 hearing are taxed against defendant.

This 7th day of May, 1979.

/s/ CLYDE W. HENLEY
THE HON. CLYDE HENLEY,
JUDGE, SUPERIOR COURT OF
DEKALB COUNTY

APPENDIX "D"

35204. NODVIN v. NODVIN.

Judgment affirmed without opinion pursuant to Rule 59.

All the Justices concur.

Submitted August 30, 1979 — Decided September 26, 1979 — Rehearing denied October 16, 1979.

Contempt. DeKalb Superior Court. Before Judge Henley.

Worozbyt & Nodvin, Marvin P. Nodvin, J. Steven Cheatwood, for appellant.

Macy & Zusmann, George S. Stern, for appellee.

APPENDIX "E"

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 10-16-79

The motion for a rehearing was denied today:

Case No. 35204. Nodvin v. Nodvin.

Hall, J., dissents.

Yours very truly,
MRS. JOLINE B. WILLIAMS,
Clerk.

APPENDIX "F"

Section 6. Said Code Title is further amended by striking Code Section 30-201 which reads as follows:

"30-201. Definition. Permanent and temporary.—Alimony is an allowance out of the husband's estate, made for the support of the wife when

living separate from him. It is either temporary or permanent. The wife shall not be entitled to alimony if it is established by a preponderance of the evidence that the separation between the parties was caused by the wife's adultery or desertion. In all cases in which alimony is sought by the wife, the court shall receive evidence of the factual cause of the separation even though one or both of the parties may also seek a divorce, regardless of the grounds upon which a divorce is sought or granted by the court. In all other cases in which alimony is sought by the wife, alimony is authorized, but not required, to be awarded to the wife in accordance with her needs and the husband's ability to pay. In determining whether or not to grant alimony to the wife, the court shall also consider evidence of the husband's conduct toward the wife. Should the husband die prior to the court's order on the issues of alimony, the rights of the wife shall survive and be a lien upon the estate of the deceased. Pending final determination by the court of the wife's right to alimony, the husband shall not make any substantial change in the assets of his estate except in the course of ordinary business affairs and bona fide transfers for value".

in its entirety and inserting in lieu thereof a new Code Section 30-201 to read as follows:

"30-201. Definition. Permanent and temporary. Alimony is an allowance out of one party's estate, made for the support of the other party when living separate. It is either temporary or permanent. A party shall not be entitled to alimony if it is established by a preponderance of the evidence that the separation between the parties was caused by that party's adul-

tery or desertion. In all cases in which alimony is sought, the court shall receive evidence of the factual cause of the separation even though one or both of the parties may also seek a divorce, regardless of the grounds upon which a divorce is sought or granted by the court. In all other cases in which alimony is sought, alimony is authorized, but not required, to be awarded to either party in accordance with the needs of the party and the ability of the other party to pay. In determining whether or not to grant alimony, the court shall consider evidence of the conduct of each party toward the other. Should either party die prior to the court's order on the issues of alimony, any rights of the other party to alimony shall survive and be a lien upon the estate of the deceased. Pending final determination by the court of the right of either party to alimony, neither party shall make any substantial change in the assets of the party's estate except in the course of ordinary business affairs and bona fide transfers for value."

Section 7. Said Code Title is further amended by striking Code Section 30-202 which reads as follows:

"30-202. Proceedings to obtain temporary alimony.—Whenever an action for divorce, at the instance of either party, or suit by the wife for permanent alimony, shall be pending, the wife may, at any regular term of the court in which the same shall be pending, apply to the presiding judge, by petition, for an order granting to her temporary alimony pending the cause and, after hearing both parties and evidence as to all the circumstances of the parties and as to the fact of marriage, the court shall grant an order allowing such temporary alimony, including expenses of litigation, as the condition of the husband and the facts of the case may justify.",

in its entirety and inserting in lieu thereof a new Code Section 30-202 to read as follows:

"30-202. Proceedings to obtain temporary alimony. Whenever an action for divorce or a suit for permanent alimony shall be pending, either party may apply, at any time to the court in which the same shall be pending, to the presiding judge, by petition, for an order granting such party temporary alimony pending the cause. After hearing both parties and evidence as to all the circumstances of the parties and as to the fact of marriage, the court shall grant an order allowing such temporary alimony, including expenses of litigation, as the condition of the parties and the facts of the case may justify."

Section 14. Said Code Title is further amended by striking Code Section 30-209 which reads as follows:

"30-209. Jury may provide permanent alimony; factors in determining amount; effect of remarriage.—The jury rendering the final verdict in a divorce suit may provide permanent alimony for the wife, either from the corpus of the estate or otherwise, according to the condition of the husband. In all cases where alimony is awarded to the wife, her separate estate and earning capacity, as well as any fixed liabilities of the husband for the support of minor children, shall be taken into consideration in fixing the amount. All obligations for permanent alimony to the

wife, whether created by contract, verdict, judgment, or decree, the time for performance of which has not yet arrived, shall cease upon her remarriage unless otherwise provided in the decree.",

in its entirety and inserting in lieu thereof a new Code Section 30-209 to read as follows:

"30-209. Jury may provide permanent alimony; factors in determining amount; effect of remarriage. The jury rendering the final verdict in a divorce suit or the court entering a final decree in a divorce suit tried without a jury may provide permanent alimony for either party, either from the corpus of the estate or otherwise, according to the condition of both parties, including the separate estate, earning capacity, and fixed liabilities of each party. All obligations for permanent alimony to a party, whether created by contract, verdict, judgment, or decree, the time for performance of which has not arrived, shall cease upon remarriage of the party to whom such obligations are owed unless otherwise provided."